No. 73-1210

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO., TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal From the United States District Court for the District of Oregon

BRIEF OF APPELLEES

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INTRODUCTION

This is a Brief submitted on behalf of the Appellees, plaintiffs in the Court below, in answer to the Brief submitted by Appellant, Interstate Commerce Commission, Intervenor in the Court below. This appeal is a direct appeal by the Interstate Commerce

Commission from a Decree of the U. S. District Court, for the District of Oregon, sitting as a Three-Judge Court pursuant to 28 USC 2321-2322, dated October 18, 1973, nullifying and enjoining the enforcement of an Order of the Appellant known as Service Order 1134. The United States of America, the Defendant in the Court below, which jointly with Appellant filed an Answer to the plaintiff's complaint and defended the validity of Service Order 1134 in the Court below, did not appeal, has now confessed error and has filed a Motion to Affirm the Decree of the United States District Court. Admittedly, Service Order 1134 was issued by the Appellant under the purported authority of 49 USC 1(15) without notice, hearing or opportunity to be heard.

I

Issue

The basic issue before this Court is, and before the Court below was, whether the Appellant exceeded the authority granted to it by 49 USC 1(15). The District Court held that Service Order 1134 was invalid because it exceeded the authority granted to Appellant by 49 USC 1(15). The Court below held it was an "illegal rate-fixing order developed through procedures lacking due process". (App. 69)

II

Description of Service Order 1134

The order in question, which was issued under

the purported authority of 49 USC 1(15), applies only to the transportation of lumber and plywood by railroad. It provides that in the event car load shipments of lumber or plywood are held at a transfer point more than 120 hours, and thereafter forwarded to another destination, or delivered to a newly designated consignee, that shipment will lose the benefit of any applicable through rate from the shipping point to the ultimate destination. As the District Court found,

> "The railroad joint or through shipping rate from the point of origin to the ultimate final destination is always substantially less than the combined or aggregate of short haul rates between intermediary points. For example, through rate for a 7500 lb. minimum carload from Pacific Coast shipping points to New York, via the intermediate points of Marshalltown, Iowa, and Chicago, Illinois, is $1432.50, while the aggregate of the three local rates between points totals $2452.00." (App. 65)

More examples of similar differences will be found in the Appendix at Pages 41-43.

III

Description of Marketing Procedures of Wholesale Lumber Industry and Economic Justification Therefor

The testimony of the Plaintiffs, in the form of a sworn statement by A. M. Cheatham, setting forth the practices of the wholesale lumber and plywood industries, indicate that while a very small proportion

of the lumber shipments from the West Coast would be affected by the order, the elimination of the use of hold points, which is the practical economic effect of the order, would be the require mills supplying Plaintiffs in this action alone to carry an additional 2.5 billion board feet of inventory. Aside from causing an impossible financial burden to the smaller mills particularly, such a requirement would have a drastic effect on lumber prices, particularly in a period of high demand. It thus appears the present marketing practices have a distinct and important benefit to the public and are not the result of some arbitrary whim of the lumber wholesalers or induced by sinister motives. It is a recognized, built-in mechanism of the established marketing pattern sanctioned by existing tariffs, which have the force and effect of law and which have been established in accordance with the usual practices of the Interstate Commerce Commission with all of the usual due process safeguards provided by normal Interstate Commerce Commission procedure. At any time during the many years the present marketing practices have been in existence, the railroads, or the Interstate Commerce Commission, could have instituted appropriate proceedings to amend the applicable tariffs so as to eliminate hold points. Of course, the proceedings would have required appropriate notice to all interested parties and hearing to develop satisfactory evidence to establish that such changes were in the public interest. Although the facts today are no different from those that have periodically arisen for the last fifty years,

the Appellant seeks to accomplish now by an ex parte proceeding, without notice, hearing or any right to judicial review, what it could have tried to do properly at any time in that period.

As the District Court found, based upon the Stipulation of the parties (App. 35), "the Commission has never in the past issued an order pursuant to the claimed authority of 49 USC 1(15)" which impose the sanctions upon shippers contained in the order or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff.

The Appellant's Brief (Pages 9-10), in order to excuse its actions in this case, cites Service Order No. 692 and Service Order No. 858 as similar to the order in the case at Bar. It should be noted that by stipulation of the parties (App. 35), the parties agree as follows:

> "7. The parties stipulate that the Interstate Commerce Commission has never in the past issued an order pursuant to the claimed authority of 49 USC 1(15), or which imposed the sanctions contained in Service Order 1134, or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff."

Even if true, the fact that the Appellant in the past may have issued an illegal order which was not contested, is no excuse for its actions in this case. However, in light of the solemn stipulation entered into between the parties, which is a part of the record of

this case, this Court should disregard this argument. (Appellant's Brief 10)

The Plaintiffs did not submit the testimony of Mr. Cheatham for the purpose of having the District Court, or this Court, decide whether hold points are, or are not, in the public interest. The Plaintiffs recognize that this decision must be made by the Interstate Commerce Commission. The testimony was submitted for the purpose of showing there are serious questions of public policy involved which can only be decided after notice and full consideration of the testimony of all interested parties. This is the statutory scheme of the Interstate Commerce Act as required by law except in very narrow areas with respect to which, Congress explicitly provided otherwise. To decide these very important and delicate questions of public policy on the basis of ex parte decisions, by faceless and nameless individuals, is not only in violation of the Interstate Commerce Act but is the very essence of arbitrary and capricious conduct.

IV

Legislative History of 49 USC 1(15)

49 USC 1(15), which is purported authority under which the Interstate Commerce Commission issued Service Order 1134, originated as HR 2035, 64th Congress, Second Session. The House Committee on Interstate Commerce of that Congress, which was the sponsor of the bill, issued a report favoring its passage (House Report 1553, 64th Congress Second

Session) but it was not passed in that session. An identical bill, known as HR 328, 65th Congress, First Session, was re-introduced and the House Interstate Commerce Commission issued a favorable report (House Report 18, 65th Congress, First Session). After minor verbal changes by the Senate, the bill was passed on May 29, 1917. The Act was amended in particulars not relevant to the problem before this Court by the Transportation Act of 1920 (see House Report 456, 66th Congress, First Session, Page 17). The Committee Reports in the 64th and 65th Congress are virtually identical and the conditions of the railroad industry and the problems relating to car shortages in the Reports are amazingly similar to what they are today. The House Committee in both Sessions of Congress (House Report 1553, 64th Congress, Second Session page 9 and House Report 18, 65th Congress, First Session page 8) stated that the purpose of the bill was to carry out the recommendations of the Interstate Commerce Commission in its Annual Report of December 1, 1916, as follows:

> "That the Commission be given definite and specific authority to prescribe for all carriers by rail subject to the Act, rules and regulations governing the interchange of cars, return of cars to owning railroads, the conditions and circumstances under which such cars may be loaded on foreign roads, and the compensation which carriers shall pay to each other for use of each other's cars. The carriers should be required to publish, post and file with the Commission under the provision of Section 6 of the Act, such

rules and regulations prescribed by the Commission and should be held to an observance of these rules and regulations just as they are held to the observance of their lawfully published, posted and filed rates."

It will be noted that the recommendation of the Commission dealt only with (1) interchange of cars; (2) return of cars to owning railroad; (3) conditions and circumstances under which such cars may be loaded on foreign roads; and (4) compensation which carriers shall pay to each other for the use of each other's cars.

The Commission did not recommend, nor did Congress intend to pass, legislation permitting the Interstate Commerce Commission, on an ex-parte basis, without notice or hearing, to alter existing tariffs so as to change the basis of transportation rates and practices. The appellant has stipulated that it has never in the fifty-six years since the enactment of 49 USC 1(15) or its predecessor issued a car service order which purports to have the same effect as Service Order 1134 (App. 35). This it is submitted is some evidence that the Commission has not considered the fact that it had such authority because the record of the Commission prior to the issuance of Service Order 1134 is replete with statements that the Commission was using all of its means and powers to cope with the continuous boxcar shortage. The letter of February 20, 1969, to Honorable Robert Packwood, Senator from Oregon, signed by Virginia May Brown, Chairman of the Interstate Commerce Com-

mission, is an example of the statements of the Commission over the course of years (App. 51-52).

V

Service Order 1134 Exceeds the Authority of the Interstate Commerce Commission Because It Directs a Change in Transportation Rates and Is Not a Service Order

One of the basic arguments of the Appellants in this Court, and which was the basis of the decision of the Court below, is that the Interstate Commerce Commission has exceeded its statutory authority in issuing Service Order 1134 without notice or hearing and without conforming to the due process provisions contained in the other sections of the Interstate Commerce Act. Putting it another way, Appellees' argument is that the Commission has changed the rates of transportation by use of a statutory provision which was never intended for such purpose and did not authorize the Commission to act in the manner it did.

The first and leading case construing the effect and extent of the authority granted to the Interstate Commerce Commission by 49 USC 1(15) is *Peoria and Pekin Railway Co.* v. *U. S.*, 263 U.S. 528. In that case, Justice Brandeis said, at 263 U.S. 534-535,

> "Transportation Act of 1920, evinces in many provisions the intention of Congress to place upon the Commission the administrative duty of preventing interruptions in traffic. But there is no general grant of emergency power to that end and the detail in which the subjects of such power have been specified, precludes its extension to other subjects by implication."

The rationale of the *Peoria* case is that the actions of the Interstate Commerce Commission can only be taken after hearing and notice unless there is very specific authority granted to the Commission to act without such hearing and notice with respect to the particular action taken by the Commission. The Court also held that the term "car service" had a very limited meaning and did not include transportation. In the later case of *U. S.* v. *Michigan Portland Cement Co.*, 270 U.S. 521, at 527, Chief Justice Taft, after referring to the *Peoria* case, states

> "It was held that the exercise of the emergency power of the Commission . . . was strictly to be construed. . . ."

The Court in the *Michigan* case upheld an order giving regulatory directions for preference of priority in the use of cars. This, of course, is an entirely different power than the Commission purported to use in the issuance of Service Order 1134. In the case of *Bodine and Clark Livestock Commission Co.* v. *Great Northern Railroad*, Court of Appeals, 9th Circuit, 63 F.2d 472, the Court stated,

> "While it may be conceded, however, that the language of the statute defining 'car service' it seems general in character, the Supreme Court has held that it is limited in scope solely to situations involving a purpose 'to make these [railroads]' instrumentalities available in emergencies to a carrier other than the 'owner.' "

The limited sense of the phrase "car service" in 49 USC 1(10), the defining paragraph, is elaborated

upon in the case of *Peoria and Pekin Union Railway Co.* v. *U. S.*, 263 U.S. 528, 533, 534, 44 S. Ct. 194, 196, 68 L. Ed. 427, in the following language,

> "The argument that the authority of the Commission over car service should be construed to include the requiring of switching rest upon paragraph 10 of the amended Section 1 of the Act to regulate commerce [49 USC 1(10)]. But car service connotes the use to which vehicles of transportation services rendered by means of them."

It will be noted that any authority granting the Commission the right to change "rates of transportation charges" or similar words as a part of its emergency powers are conspicuous by their absence. If the words of Justice Brandeis, at 236 U.S. 534, to the effect that,

> "Congress has given no general grant of emergency power unto the Commission and the detail in which Congress has spelled out the emergency power it did give, precludes the extension to other subjects by implication.",

mean anything, they mean that the Commission cannot change duly published rates of transportation pursuant to an emergency order without notice, hearing or any other safe guard normally relating to the rate-making procedure, by making use of what must be considered purely an implied grant of authority under the provisions of 49 USC 1(15). This Court has stated that 49 USC 1(15) contains no implied grant of authority previously, and it should reaffirm that holding likewise with respect to this order and

affirm the Decree of the Court below for that reason.

The Appellant attempts to make use of *Iversen* v. *U.S.*, 63 F. Supp. 1001, as authority for its order in this case, and makes the statement that in that case the Court "sustained the issuance of a service order identical to the one at Bar" (Appellant's Brief P. 23). This is a misleading statement. The *Iversen* case involved demurrage charges only, not charges for rates of transportation. The issue before this Court at this time was not even considered in the *Iversen* case. Furthermore, the Court in the *Iversen* case made it very clear that demurrage is entirely different from rate-making. To quote the court, (63 F. Supp. 1005)

> ". . . it seems clear that demurrage charges in part compensation and in part penalty; that in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are sui generis. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. . . ."

This is exactly the point made by the Court below. Rules and regulations, as understood historically and textually, may refer to demurrage shares or penalties but not to rate-making. This Court, by affirming the *Iversen* case, (327 U.S. 761) affirmed the distinction which was made by the Court in the *Iversen* case as above quoted. The attempt to make use of the *Iversen* case as authority for the proposition that the Appel-

lant can use its emergency powers to issue a rule which affects rates of transportation is to distort the intent and meaning of the case. This was also the understanding of the Court in the case of *Chicago, Milwaukee & St. Paul Railroad* v. *McCree*, 91 F. Supp. 60, wherein the Court stated,

> "At the outset it should be noted that although it is common practice to speak of demurrage 'rates', to fix demurrage charges for the detention of equipment is not to fix a 'rate' as that term is used in the Interstate Commerce Act. . . ."

Thus, in the *Iversen* case, which was affirmed by this Court, and in *Chicago, Milwaukee & St. Paul Railroad* v. *McCree*, supra, the Courts drew a very firm distinction between demurrage charges and rates of transportation. With respect to demurrage charges, the Courts have held that they come within the term of "rules, regulations and practices." With respect to rates, the plain meaning of the decisions were that they do not. 49 USC 1(15) gives the Commission power with respect to rules, regulations and practices but not rates of transportation. This is what the Court below said in this case. The Court below specifically stated that demurrage charges for cars held at a given point over a stated time has been a traditional sanction upon shippers to keep the cars rolling, but Service Order 1134 went far beyond that by changing the rates of transportation (App. 64, 65, 66). It thus appears that the Court below in the case at Bar, followed the distinction that has been made in the *Iversen* case, supra, and the *Chicago, Milwaukee & St.*

Paul case, supra, between demurrage charges and rates of transportation.

VI

Service Order 1134 Exceeds the Authority of the Interstate Commerce Commission Because There is No Emergency as Required by 49 USC 1(15)

The Appellant claims that Service Order 1134 is a car service order which it had authority to issue under 49 USC 1(15). The court below held that it was not. The court held it was in effect an amendment to the tariff, passing as a car service order and the label given the action of the appellant was a mask to attempt to legitimize an action designed to by-pass normal due process procedures (App. 69). The appellees urge that this is the correct view of the situation. Even if it is not, the appellees contend the appellant exceeded its powers in other regards and the order should be set aside for that reason.

The entire statutory scheme of the Interstate Commerce Act and its statutory history makes it clear that "non-emergency" problems can only be dealt with by the appellant after appropriate hearings, notice, opportunity to be heard, judicial review and all of the other safeguards which normal administrative procedures have given affected parties and that these can be disregarded only in cases of "emergencies." (See *U. S.* v. *Thompson*, 58 F. Supp. 213, at 216.)

There are two sections of the Interstate Commerce Act authorizing the appellant to issue car service or-

ders. 49 USC 1(14) provides for all of the above normal administrative procedures, which admittedly were not used in this case. 49 USC 1(15), under which the appellant purported to act in this case, eliminates such safeguards in "emergency"' cases because of what was felt to be the overriding public necessity in such cases. (See House Report 18, 65th Congress, First Session) Even if the substance of Service Order 1134 came properly within the definition of the term "service order," the threshold question to be decided in this case is whether the appellant properly acted under the "emergency" section of the Interstate Commerce Act (49 USC 1(15). Obviously, merely calling a situation an emergency does not make it so. The use of the word "emergency" is subject to the same abuses as the invocation of other similar catch phrases, and this Court must have the ultimate right to determine whether the jurisdictional facts as shown in the record are present which authorize the appellant to exercise its "emergency" powers.

As Judge Hulen states in *U. S.* v. *Thompson*, 58 F. Supp. 213, at 216,

> "Abstractly stated, section 1, paragraph 15, Title 49 U.S.C.A., gives to the Interstate Commerce Commission unusual, drastic, and in some respects dictatorial powers. Powers of such character delegated to the Commission by this law can and should be exercised only on the basis that they are necessary to meet an emergency — an emergency that does not admit of time for notice and hearing to those whose property would be affected by the order. . . ."

The appellant's brief (pages 8-9) states that the practice which Service Order 1134 was designed to eliminate was the subject of a decision of the Commission as early as 1922. Thus, the Commission was well aware of the conditions and had at least fifty years within which to take appropriate action to eliminate this practice which it finds so objectionable. This is hardly the type of emergency situation which Judge Hulen finds to be necessary in order to bring into play the drastic remedy of 49 USC 1(15). It would appear that on the basis of the appellant's own brief, it had ousted itself of jurisdiction under this Section because, to paraphrase Judge Hulen, it had at least fifty years within which to give notice and hearing to those whose property would be affected by the order, to-wit: appellees.

The admission of facts in the record of this case (App. 33-36) and the undisputed evidence (Affidavit of A. M. Cheatham, App. 44-50) shows that the condition the appellant is attempting to deal with has existed for over fifty years and the industry practices have been in existence for over thirty-three years (See Appellant's Brief, pages 8-9). It would appear that a condition which has existed for over fifty years, which has been the subject of hundreds of actions by the appellant, can hardly be called an emergency which justifies ad hoc, ex parte, helter-skelter actions attempting to deal with the problem. If the actions of the lumber industry have had a material effect on the car shortage, the time is long past when the appellant should have invoked the nor-

mal provisions of the Interstate Commerce Act and have dealt with the subject on a long range basis, taking into account the interests of all of the parties involved, by having appropriate hearings and giving all parties an opportunity to be heard. At the same time, the Interstate Commerce Commission would benefit from the knowledge of witnesses concerning industry practices and economics which even the Interstate Commerce Commission, in its infinite wisdom, might not have available to it. This is what Congress intended when it so carefully required notice and hearing except in an "emergency."

This Court has never passed upon the question of whether the mere opinion of the Interstate Commerce Commission that an "emergency" exists justifying the use of 49 USC 1(15) precludes any judicial examination of the jurisdictional facts upon which the Interstate Commerce Commission purports to act.

It is true that a District Court in *Daugherty Lumber Co.* v. *U. S.*, 141 F. Supp. 576, seems to preclude such a threshold examination except when there is proof of "fraud, wrongdoing or capriciousness," and the language of the Court in *U. S.* v. *Southern Railway Company*, 364 F.2d 86, appears to follow this reasoning. It is submitted by the appellees, however, that such a standard is much too restrictive. It permits an administrative agency to determine its own jurisdiction and eliminates effective judicial review merely by incantation of the magic word "emergency."

The opinion of District Court Judge Hemphill, in *U. S.* v. *Southern Railway Company*, 250 F. Supp. 759,

particularly at pages 762-765, would appear to be a much more accurate statement of the law and be more in keeping with our traditions of judicial review and the limitation of administrative power. The scholarly analysis by Judge Hemphill of 49 USC 1(15) in the *Southern Railway* case, supra, should be so convincing to this Court that it should not hold that the usual rules of "jurisdictional facts" should apply with respect to 49 USC 1(15). To paraphrase Judge Hemphill, 250 F. Supp. 764,

> "The net effect of what happened is that the Commission is attempting to treat a continuous chronic problem which has existed . . . [for over 50 years] . . . as an emergency requiring immediate action."

Referring to the emergency powers granted to the Commission by 49 USC 1(15), Judge Hemphill further stated, *U. S.* v. *Southern Railway Company*, supra, 250 F. Supp. 759, at 764,

> "Nowhere in the voluminous legislative history is there any suggestion that this authority could be exercised in lieu of the regular rulemaking authority given by Section 1(14)."

To paraphrase Judge Hemphill again, 250 F. Supp. 764,

> "It is obvious that Service Order No. . . . (1134) . . . as amended, sought to deal with a chronic problem, not an emergency."

The decision of the U. S. Sourt of Appeals, Fourth Circuit, in *U. S.* v. *Southern Railway Company*, 380 F.2d 49, reversing Judge Hemphill does not impair

the authority of his statements relating to the subject matter discussed herein because the case was decided in the Court of Appeals on an entirely different ground not relevant to this case.

This Court has recognized the validity of the analysis of Judge Hemphill as above stated in that we are dealing with a chronic rather than an emergency situation and the cases of *U. S.* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 at 745, wherein it states, referring to the proceedings before the Commission in that case, that the Commission found that there was a continuous shortage of freight cars. Then it went on to say, (406 U.S. 745)

> "Underlying these chronic shortages of available freight cars, the Commission found, was an inadequate supply of freight cars owned by the Nation's railroads. . . ."

This Court also stated, in *U. S.* v. *Florida East Coast R. Co.*, 410 U.S. 230,

> "This case arises from the factual background of a chronic freight car shortage on the Nation's railroads. . . ."

This Court also stated in *U. S.* v. *Florida East Coast R. Co.*, 410 U.S. 231, quoting from Senate Committee on Commerce Report, 386, 89th Congress, 1st Session, 1-2,

> "Car shortages, which once were confined to the Midwest during harvest seasons, have become increasingly more frequent, more severe and nationwide in scope as the national freight car supply has plummeted."

Thus, the issue before the Commission is not one of an emergency requiring an immediate but temporary solution but a chronic one. 49 USC 1(15) was designed to handle a limited emergency on an extraordinary basis for a temporary period of time. It was not designed to be used as a continuous remedy for a chronic condition which could only be handled by the increase in the car supply-or other means on a long term basis. To make use of an emergency power to meet a long range problem may appear to be temporarily satisfying, but it violates every principle which we have been taught to believe concerning the nature of our government and its agencies. The use of "emergency" powers to solve a chronic problem of this kind is like using a drug requiring ever increasing doses to provide a cosmetic result but which has no effect on the disease itself. This was not the intent of the Congress when it enacted 49 USC 1(15).

This Court should be well aware of the lesson history teaches concerning continuous and indiscriminate use of "emergency" power. (See "A History of the Weimar Republic", Eric Eyck, Chapter IX, pages 254-257, Harvard University Press) To paraphrase Judge Hulen in *U. S.* v. *Thompson*, supra, the Commission in this case is making use of "unusual, drastic and in some respects dictatorial powers'" in an attempt to meet a chronic condition by distortion of a section of the law which was intended to only meet temporary emergency situations.

At any time during the last thirty-three years when the practices of the appellees have been admit-

tedly in existence, the appellant could have undertaken to follow the procedures authorized by the Interstate Commerce Act as established in *U. S. Allegheny-Ludlum*, supra. It could have conducted an inquiry and commenced a proceeding for the purpose of preventing what it claims to be the harmful practices employed by the appellees and persons in similar businesses and fashioned sanctions suitable to the requirements of the case.

Of course, if the appellant did so, it would be required to hear testimony, make findings and be subject to judicial review. This is one thing the appellant has at all costs attempted to avoid by invoking the magic word "emergency", and issuing ex parte orders subject to no review and without the benefit of any input from the industries involved. This is what this case is all about!

CONCLUSION

This Court should not countenance such proceedures any longer. It should affirm the judgment of the court below, both on the basis of the opinion of the court below and on the ground that the appellant, on the face of the record, has exceeded the powers granted to it under 49 USC 1(15) because there is no showing of an emergency in any rational sense of the word.

Respectfully submitted,

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